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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-706

E.A. McQUADE TOURS, INC.,
Petitioner,

v.

CONSOLIDATED AIR TOUR MANUAL COMMITTEE, *et al.*,
Respondents.

PETITIONER'S REPLY TO BRIEF FOR RESPONDENTS IN OPPOSITION

INTRODUCTION

Petitioner, E.A. McQuade Tours, Inc. (McQuade), submits this reply to the brief for respondents (CATM) pursuant to Rule 24(4) of this Court.

ARGUMENT

A COLLECTIVE REFUSAL TO DEAL, ADVERSELY AFFECTING COMPETITION, IS A *PER SE* VIOLATION OF THE SHERMAN ACT

In response to the argument at page 6 of CATM's brief that the Court of Appeals did not find that "competition" had been adversely affected by CATM's collective refusal to deal with McQuade, this Court is respectfully referred to the decision below. The Court of Appeals recognized that McQuade could not effectively compete in the sale of tour programs if such programs were not published in the Manual (Pet.,[1] pp. 10a, 12a, 16a). The exclusion of McQuade's programs adversely affected competition in the sale of such programs.

CATM does acknowledge a collective refusal to deal with McQuade, in the exclusion of McQuade's programs from the Manual in 1965 and in 1968, but claims that this should not be considered a *per se* violation of the antitrust laws since CATM is an "economically productive group".[2] The cases cited by CATM involve applicants seeking to join such groups, or members of such groups adversely affected by the group's rules, and are inapposite here, where McQuade did not seek to join CATM, but to pay for and advertise in the Manual (Pet., pp. 11-12).

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[1] Pet. refers to McQuade's Petition for a Writ of Certiorari.

[2] CATM's brief, p. 6, fn. 4. CATM made this same argument to the Court of Appeals, which apparently rejected it, *sub silentio*. In any event, this Court has applied the *per se* rule to group boycotts by economically productive groups. *See, e.g., Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963), *rehearing denied* 375 U.S. 870. *See, also, Ricci v. Chicago Mercantile Exchange*, 447 F.2d 713 (7th Cir. 1971), *certiorari granted* 31 L.Ed.2d 230 (1972), argued Oct. 18, 1972.

CATM has also taken issue with petitioner's statement: "There is no precedent, in this Court or in any court of appeals, for use of the rule of reason to test such a restraint of trade", referring to a "collective refusal to deal which adversely affected competition." (Pet., pp. 10-11). Petitioner reasserts this statement, which is not contradicted by the cases cited by CATM at page 10 of its brief.[3]

[3] In *Silver v. New York Stock Exchange, supra,* this Court did not employ the rule of reason test, but found the group boycott to be a *per se* violation. *Elder-Beerman Stores v. Federated Department Stores,* 459 F.2d 138 (6th Cir. 1972), involved exclusive representation arrangements (*See,* Pet., p. 11), and there was no proof of a conspiracy. In *Lamb Enterprises, Inc. v. Toledo Blade Co.,* 461 F.2d 506 (6th Cir. 1972), *certiorari denied* 41 U.S.L.W. 3254 (Nov. 6, 1972), there was substantial evidence in support of the jury's finding that there was not a conspiracy. *Cartrade, Inc. v. Ford Dealers Adv. Ass'n,* 446 F.2d 289 (9th Cir. 1971), *certiorari denied* 405 U.S. 997 (1972), concerned an exclusive contract arrangement and not a boycott case (Pet., p. 11), and no appreciable effect on interstate commerce. In *Bridge Corp. of America v. American Contract Bridge League,* 428 F.2d 1365 (9th Cir. 1970), *certiorari denied* 401 U.S. 940 (1971), there was not a group boycott or evidence to demonstrate a refusal to deal. *Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd.,* 416 F.2d 71 (9th Cir. 1969), *certiorari denied* 396 U.S. 1062 (1970), did not involve a conspiracy, but an exclusive franchise arrangement (Pet., p. 11). In *Deesen v. Professional Golfers Ass'n.,* 358 F.2d 165 (9th Cir. 1966), *certiorari denied* 385 U.S. 846 (1966), there was not a conspiracy or combination to monopolize, the case involving an applicant for membership in a group. (Pet., pp. 11-12; CATM brief, p. 6, fn. 4). In *Ruddy Brook Clothes, Inc. v. British & Foreign Marine Ins. Co.,* 195 F.2d 86 (7th Cir. 1952), *certiorari denied* 344 U.S. 816 (1952), refusal to sell insurance to a "poor risk" did not bring defendants within the ban of the Sherman Act.

It should be further noted that in *White Motor Co. v. United States,* 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738 (1963), the *per se* test was applied to price fixing, and use of the *per se* rule for territorial limitations was not disavowed when the case was

[continued]

THE SEVENTH AMENDMENT PROSCRIBES REEXAMINATION OF A JURY'S DETERMINATIONS OF FACT AND THE ASSUMPTION OF THE FACT-FINDING ROLE BY THE COURT OF APPEALS

Lest CATM's contentions obfuscate petitioner's second question, petitioner must respond to the argument at pages 11-16 of CATM's brief.[4]

Petitioner's second question is not a request that this Court review the findings of fact by the court below. Petitioner seeks review of the violation of its Seventh Amendment rights. The Court of Appeals failed to consider that the jury's verdict may have been based on its finding that the rules were "applied in an unreasonable or arbitrary manner to the plaintiff's requests for tour program . . ." (Pet., pp. 8, 10, 15-17). Rather, the Court of Appeals improperly reexamined and redetermined the facts considered by the jury. The court below further erred by arrogating to itself issues of fact which are the province of the jury.[5]

[continued]
remanded for trial. In *Times-Picayune Pub. Co. v. United States,* 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277 (1953), this Court stated that the *per se* rule was used in tying arrangements, but found that tying was not present.

[4]Petitioner does not here question the authority of a court of appeals to reverse a district court's denial of a motion for judgment notwithstanding the verdict, but does question the relevance of this argument where CATM did not appeal the denial of the motion for a judgment n.o.v., and where the court below did not find that said motion should have been granted. Unlike *Neely v. Eby Construction Co.,* 386 U.S. 317, 87 S.Ct. 1072, 18 L.Ed.2d 75 (1967), the court below did not find the evidence to be insufficient to support the verdict.

[5]CATM's argument in footnote 7, pages 14-16 of respondents' brief, further demonstrates that these disputed questions of fact should have been left to the jury's determination.

These matters are encompassed by petitioner's second question (Pet., p. 2), and certiorari should be granted to review these actions by the court below, which are in violation of petitioner's rights and in conflict with this Court's decisions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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